No. 84-493

(3)

In the Supreme Court of the United States

October Term, 1984

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S. E. JOHNSON COMPANY,
THE OHIO ENGINEERING COMPANY
FRED R. CREAGER & SONS, INC.,
MATCO INC.,
OAMCO, INC.,
C. P. CALAWAY, INC.,
THE MAUMEE STONE COMPANY,
THE MICHIGAN STONE COMPANY,
WOLCOTTVILLE SAND & GRAVEL CORP. and
J. T. KIRKBY,
Petitioners,

VS.

ARTHUR S. LANGENDERFER, INC. and
NORTHERN OHIO ASPHALT PAVING CO.,
Respondents.

ON PETITION FOR CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RULE 28.1 STATEMENT

Material Suppliers of Northwest Ohio, Inc., an Ohio corporation, is a non-wholly owned subsidiary of Northern Ohio Asphalt Paving Co. MacRitchie Materials, Inc., the proposed intervenor below, is an affiliate of Respondent.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

On September 27, 1984, Respondents herein (Langenderfer) filed their own Petition for a Writ of Certiorari to the Sixth Circuit Court of Appeals to request review of its (2-1) decision vacating judgments of the District Court awarding treble damages and injunctive relief against Petitioners herein (Johnson). A retrial was ordered. Langenderfer's Petition is pending in this Court as Docket No. 84-508. Johnson, the prevailing party in the Court of Appeals, has also filed its own Petition for Certiorari pending herein as Docket No. 84-493. Thus, the anomalous posture of these proceedings is that both parties have sought review of the Court of Appeals' decision below. We vehemently agree with Johnson that the policy issues presented by both petitions for review are of extreme importance in the construction of the antitrust laws and that these questions should be resolved by this Court now rather than await the enormous expense, delay and injustice inherent in yet another monopoly trial and years of appeals. Johnson has illegally monopolized the Northwestern Ohio asphalt paving industry since 1972—it is time to put an end to it. We respectfully oppose Johnson's petition for certiorari on the grounds that it is inconsistent with the Court's long-standing adherence to the principle that the prevailing party in the Court of Appeals may not obtain review of a decision in its favor. *Public Service Commission v. Brashear Freight Lines, Inc.*, 306 U.S. 204, 206 (1939); Stern and Gressman, SUPREME COURT PRACTICE, § 2.4, pp. 58-59 (5th Ed. 1978)

We respectfully submit that Langenderfer's petition should be granted (Docket 84-508). The Sixth Circuit has created a legal *per se* rule in favor of an illegal monopolist. No court has gone so far. The case presents a unique opportunity for the Supreme Court to draw the ultimate boundary line beyond which a monopolist's conduct may not go. We also wish to correct misleading assertions contained in Johnson's petition which distort the evidence and findings below.

STATEMENT OF THE CASE

A full statement of the case is set forth in Langenderfer's Petition for Certiorari (Docket No. 84-508) at pp. 1-12 to which reference by incorporation is made. We note that Johnson's Petition continues to distort the record of the case below—principally to make out that Langenderfer's whole Sherman Act case was based solely on Johnson's predatory bidding. E.g., Johnson's Petition (p. 4) asserts that Langenderfer's claim of violation was that "Johnson combined and conspired to drive Langenderfer out of business by 'monopolistic and anticompetitive practices' *in bidding for the jobs in question.*" Although Johnson succeeded in misleading the majority of the Court of Appeals to treat this as a predatory pricing case instead of a monopoly case, we trust they will not be successful in doing so here. Predatory bidding was only one aspect of the case. The case was tried and submitted as a traditional monopoly case—Langenderfer claimed that Johnson restrained trade, monopolized, and attempted and conspired to monopolize the Northwestern Ohio asphalt paving industry. Predatory bidding was only *one* of twelve inter-related anticompetitive and monopolistic practices which were disclosed by the evidence and submitted to the

jury. Excerpts from the trial court's full-blown monopoly charge to the jury (Appendix A hereto) irrefutably demonstrate that the case was tried, submitted and decided as a *monoply* case.

What Langenderfer in fact alleged and what the trial court instructed the jury is that:

> "The plaintiffs allege that the defendants have violated the Federal antitrust laws by unreasonably restraining trade, monopolizing and conspiring, and attempting to monopolize, interstate trade and commerce in the asphalt paving industry." (App. A1).

After correctly charging the jury on the definitions of monopoly, monopoly power, monopolization, attempt to monopolize and the relevant market, the court submitted the twelve specific practices claimed by Langenderfer against Johnson which may be paraphrased as follows (App. A3-A5):

(1) Acquisition of the mix plants and businesses of five actual asphalt paving competitors;

(2) Acquisition of a large number of quarries and sand pits upon which remaining paving competitors were dependent for raw materials, resulting in Johnson's control and domination of highway construction materials, exclusive dealing and distortion of normal competitive conditions;

(3) Acquisition of a major bridge building company so as to package bids which other competitors had to sub-contract for;

(4) Selling stone and sand at monopolistic, predatory and unreasonably high prices to competitors;

(5) Refusing to sell sand on occasions to competitors;

(6) Intimidating or discouraging competitors from building their own asphalt plants or bidding against Johnson on high tonnage jobs while threatening to run them out of business, withhold essential stone or sand, undercut them in local market areas or otherwise leveraging Johnson's power in one market to control or suppress competition in another;

(7) Predatory pricing of bids for highway contracts with prior knowledge of Langenderfer's or other competitors' paving costs;

(8) Forcing Langenderfer and other paving competitors to lose highway contracts to Johnson or take them at a loss or marginal profits by bidding at unreasonably low figures, relying on excessive profits made by its quarry operations from the sale of road building materials to Langenderfer and others to produce an overall profit;

(9) Subsidizing Johnson's predatory bidding of paving operations by profits and leverage realized from monopolizing the sale of stone and sand;

(10) Aggravating the effects of these practices by charging quarry operations with costs properly allocable to paving operations;

(11) Forcing out of business, preventing, discouraging or buying up new or other sources of stone and sand which would have been competitive with those already controlled by Johnson; and

(12) Suppressing and restraining actual and potential competition by the sheer size and dominance of the financial and physical resources of the combined and affiliated Johnson companies and the economic leverage that their total integrated operations afforded.

This was the compendium of monopolistic and anticompetitive practices submitted to the jury in support of Langenderfer's Sherman §2 claim, not just predatory bidding. It was proper to submit all these practices to the jury as part of a total monopolization claim because "in cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. '. . . [T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.' " *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 698 (1962). "Plaintiff's evidence should be viewed as a whole. Each of the 'six things' [anticompetitive acts] viewed in isolation need not be supported by sufficient evidence to amount to a §2 violation. It is enough that taken together they are sufficient to prove the monopolization claim." *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1522, n.18 (10th Cir. 1984).

If Johnson's predatory bidding practices were the point of the spear that entered the wound, it was the shaft and thrust of illegally-acquired monopoly power that supplied the force and leverage for the fatal blow. So it was that the dissenting judge found that "[t]he alleged predatory pricing in this case was nothing more than a manifestation of Johnson's monopoly power." 729 F.2d at 1061. Even the Sixth Circuit majority found that Johnson had created a "monopolistic market structure" and "intended to eliminate competition and dominate the market." 729 F.2d at 1054. That being true, a violation of Sherman §2 should have been found by the Sixth Circuit whether or not Johnson's bidding practices were unlawful or innocent standing alone since they were part and parcel of the whole monopolistic scheme comprising the twelve monop-

olistic practices. In short, by accepting Johnson's theory of appeal, the Sixth Circuit majority opinion allowed the "predatory pricing" tail to wag the "monopoly" dog.

Johnson's petition (p. 6) grossly misrepresents that the trial court held that the other eleven anticompetitive practices alleged against Johnson "were not specifically proved, however, by evidence at trial." This distortion is immediately evident from a reading of the trial court's opinion upon its granting of broad injunctive relief against Johnson (See Langenderfer's Petition A40-45). The trial court found that "at a minimum, plaintiffs are entitled to an injunction which would prevent defendants from a continuation of those anticompetitive practices clearly shown by the evidence at the March, 1980 trial on the merits." (*Id.* A40). Thus, the trial court clearly found that Johnson's acquisitions were anticompetitive and enjoined Johnson "from acquiring any limestone quarries, sand or gravel pits, asphalt plants or other paving companies within the next ten (10) years" without the court's consent. "Another injunction fully warranted by the evidence adduced at trial is a prohibition against the defendants' practice of intimidating, threatening or discouraging plaintiffs or other competitors from building their own asphalt plants or from bidding certain kinds of state work." (*Id.* A41-42). As to bidding practices, the trial court stated as follows (*Id.* A42-43):

> "Finally, this Court feels that the evidence at trial justifies some injunctive relief in connection with the bidding practices of the defendants. The major thrust of much of the evidence at trial was aimed at the predatory nature of defendants' bidding on ODOT and OTC projects. At trial, plaintiffs vigorously attempted to show how defendants deliberately excluded competition by bidding low and deliberately sacrificing short term profits for the purpose of driving rivals out of business.

While plaintiffs' evidence at trial showed that the defendants' bids were often below plaintiffs' costs, any evidence of defendants' bids below its *own* costs was scarce. There was some testimony by Howard A. Shank, defendants' Vice President and chief estimator, that he bid below cost and overhead only on specific items in preparing a bid on OTC and ODOT projects. Transcript pp. 648-710. Nonetheless, this Court feels that it would [be] appropriate to include an order prohibiting defendants from bidding below their own costs on ODOT and OTC projects."

As to price discrimination, refusals to deal and tying, the trial court stated as follows (*Id.* A44-45):

"In the present case, this Court finds that the *International Salt* line of cases justifies the issuance of injunctions in the areas of price discrimination, refusals to deal, and tying arrangements in the asphalt paving industry in northwestern Ohio. There was no hard evidence at trial establishing that defendants had actually engaged in these specific practices. However, the evidence at trial did establish that the defendants possessed strong control over raw material sources (i.e. sand and gravel pits) in northwestern Ohio.

This Court senses, and the evidence at trial implied, that this type of control over raw materials could lead to the types of abusive practices sought to be enjoined by plaintiffs and which are already prohibited by the antitrust laws. Thus, under the doctrine of *International Salt*, this Court finds that it will exercise its equitable powers to prohibit the defendants from engaging in practices of price discrimination, refusals to deal and tying arrangements."

Thus, the representation in Johnson's Petition that practices other than predatory bidding were not actually proved at trial is grossly misleading. Whether or not there is hard, soft or scarce evidence of other patently illegal practices such as price discrimination, refusals to deal and tying is beside the point because Langenderfer's evidence should be viewed "as a whole. Each of the '[twelve] things' viewed in isolation need not be supported by sufficient evidence to amount to a §2 violation. It is enough that taken together they are sufficient to prove the monopolization claim." *Aspen Highlands, supra* at 1522. The episodes of price discrimination, refusals to deal and tying "may be in themselves wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute [§2] forbids, they come within its prohibition," *American Tobacco Co. v. United States,* 328 U.S. 781, 809 (1946). Obviously, the district court found that Johnson's total conduct amounted to a violation of the Sherman Act because it upheld the jury verdict, denied Johnson's post-trial motions, and enjoined future anticompetitive practices clearly shown by the evidence at trial. It is inexcusable for Johnson to represent that "Langenderfer's theory of Sherman Act liability turned on its claim of 'predatory pricing' " and that the trial court found "that Langenderfer's other claims of antitrust violation 'were not specifically proven by evidence at trial' . . ." (Johnson's Petition, p. 14).

One other point in Johnson's Statement of the Case deserves response. Johnson states that "never before has the cry been heard that alleged monopoly has made prices —not too high—but, as here, *too low.*" Like many other statements in Johnson's Petition, this gratuitous comment does not hold water. Predatory pricing by a monopolist (where prices are too low—not too high) has been

recognized and condemned as a violation of Sherman §2 as early as the landmark case of *United States v. The Standard Oil Company,* 221 U.S. 1, 43 (1911) ("unfair methods of competition, such as local price cutting at the points where necessary to suppress competition"). See also *Schine Chain Theatres v. United States,* 334 U.S. 110, 120 (1948) ("price cutting . . . may be the instrument of monopoly power to eliminate competitors or to bring them to their knees"); and *Utah Pie Co. v. Continental Baking Co.,* 386 U.S. 685, 696, n.12 (1967) (" 'the decisions of the federal courts in primary-line-competition cases . . . consistently emphasize the unreasonably low prices and the predatory intent of the defendants.' ")

REASONS FOR REVIEW

We agree with Johnson's petition when it states this Court should review this case because: "Nothing remains to be tried." This Court should grant review based on Langenderfer's Petition for Certiorari (Dkt. No. 84-508), reverse the Sixth Circuit and reinstate the jury verdict and trial judgments in Langenderfer's favor—then the case *will be final.* This protracted litigation will at last be over and competition hopefully restored in Northwestern Ohio.

As Langenderfer's Petition describes, the present case presents the classic basis for granting a Petition for a Writ of Certiorari (resolution of a direct conflict in the Circuit Courts) as well as an important question of antitrust law which threatens the effectiveness of future private enforcement. *See, e.g., Avco Corp. v. Aero Lodge No. 735,* 390 U.S. 557, 559 (1968) (certiorari granted to resolve direct conflict between decisions of federal courts of appeal); *Albrecht v. Herald Company,* 390 U.S. 145, 146 (1968), *rehearing denied,* 390 U.S. 1018 (1969) (certiorari granted

to resolve "important issues" of federal antitrust law); *Perma Life Mufflers v. International Parts Corporation*, 392 U.S. 134, 136 (1968) (certiorari granted to resolve an issue which "threaten[ed] the effectiveness" of private antitrust suits).

In deciding whether to grant certiorari the question is not one of strict finality below, but whether the issues presented by the Petition are fundamental to the further conduct of the case. *See, e.g., United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945) (certiorari granted, despite remand, because issue presented "is fundamental to the further conduct of this case."). *See also, Land v. Dollar*, 330 U.S. 731, 734, n.2 (1947) ("[A]lthough the judgment below was not a final one [but involved a remand], we consider it appropriate for review", citing *U.S. v. General Motors Corp., supra*); *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 685, n.3 (1949) (review granted despite remand on the basis of *Land v. Dollar, supra*). Clearly, this matter meets the *General Motors* standard: review of the questions presented in Langenderfer's Petition, on which the Circuits are sharply divided is fundamental to the further conduct of this protracted case.

If, on retrial, the critical rulings of the Sixth Circuit majority (a monopolist's limit pricing strategy is legal *per se* regardless of anticompetitive intent and effect; acquired asphalt paving competitors are not "in commerce" under Clayton §7; and there is no jurisdiction to divest the monopoly) are followed by the district court so as to exclude or limit evidence, instruct the jury, or bar claims and remedies, as a matter of law, and it turns out on the next appeal that the original rulings to which the trial court adhered were in error, the only recourse may yet be a third trial and a third round of appeals. Without review by this Court, the posture in which the Sixth Circuit has

left this case, totally frustrates a trial court's ability to do justice between these parties without substantial risk of further error and additional appellate review. The questions presented are truly "fundamental to the further conduct of the case" and its expeditious and just disposition. On the other hand, if the Sixth Circuit is now found to be in error, the case is over and the result is final.

In deciding whether to grant certiorari the practical considerations of the courts in asserting jurisdiction under 28 U.S.C. § 1291 are analogous. Where finality is at issue, the most important competing considerations are "the inconvenience and costs of piece-meal review on the one hand and the danger of denying justice by delay on the other." *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950). Both parties herein agree that further delay of review in this case will result in outrageous expense, unnecessary expenditure of judicial effort and a gross miscarriage of justice. Consider only the following facts. Johnson has been monopolizing the Northwestern Ohio paving industry since at least 1972; suit was filed in 1976; Johnson illegally ran Langenderfer out of business in 1978; the jury and trial court so found in March of 1980; on appeal, the Sixth Circuit denied Langenderfer's motion for an expedited hearing without explanation, heard argument in October, 1982 and finally decided the case in March, 1984, four years after judgment; it wiped out the treble damage judgment and even the injunction against "anticompetitive practices clearly shown at the March, 1980 trial" and ordered an expensive retrial that may take several years of further appeals. At this point, Johnson has been monopolizing the market for at least twelve years with no relief in sight—we are back to square one, if the Sixth Circuit decision stands. With the injunction expunged, Johnson is free to resume its monop-

olistic practices. Langenderfer, and the handful of competitors remaining in Northwestern Ohio, you can be sure, fully understand the axiom "Justice delayed is justice denied." It isn't as if the Sixth Circuit didn't know what it was doing. The majority found that Johnson created a "monopolistic market structure" and "intended to eliminate competition and dominate the market." 729 F.2d 1054. Despite that we have to go back and do it all over again. This protracted burden and expense on a "private attorney general" is too much to ask even though these "private actions brought by members of the public in their capacities as investors or competitors, which incidentally benefit the general public interest, perform a vital public service." *Gulf & Western Industries v. Great A&P Tea Co.*, 476 F.2d 687, 699 (2d Cir. 1973). Langenderfer was driven from business in 1978; it cannot afford this endless round of trials and appeals to achieve justice and "perform a vital public service." All the while Johnson continues its domination of the market even now free from the injunction against its monopolistic practices. We know from the record in this case that the monopolist can well afford the delay and expense its ill-gotten position supports—Langenderfer cannot.* It has already been worn down by the enormous expense and delay of this litigation, all of which serves the monopolist well. Langenderfer's only hope is that this Supreme Court grants certiorari and reviews what has happened below. To deny certiorari in this case to Langenderfer for lack of finality or a fundamental issue would mock the very system of justice we are attempting to serve.

One further piece of evidence illustrates what Langenderfer and Johnson's other competitors are up against

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*Johnson's net worth by 1978 was $21 *million* (up 136%)—Langenderfer's was $305,000 (down 80%) after eight years of operating losses (PX 108, AIII 95).

if review is delayed. Johnson has gratuitously accused Langenderfer of abusing the judicial process—of spuriously usurping the energies of the judicial system by even bringing this suit (Johnson Petition, pp. 12-13). This would be amusing if we had the heart to laugh and the charge was not another stunning piece of evidence to show the total arrogance of Johnson's monopoly power, and its perverse willingness to crow over its fallen victims. Here is a party who, without an ounce of remorse, has created a monopolistic market structure with intent to exclude competition and dominate the market; who has been found liable by a district court and jury of numerous violations of the antitrust laws; who controls up to 75-80% of the market; who bids at no profit "just to see how tough the competition is"; who boasts of low bidding to keep competition out of his area; who has intimidated and coerced its competition by express threats to put them out of business or cut off their raw materials if they competed with him; who has made good on those threats by running Langenderfer and others out of business or out of the market; who has committed almost every common garden variety antitrust violation in the book; who on the eve of a monopoly trial challenging its eleven anticompetitive acquisitions thumbs its nose at the proceedings and makes its biggest acquisition yet (Union Quarries) for $3.5 million cash. This party, who, in an earlier day, might be charged with criminal violations of the Sherman Act, is so bereft of human decency as to come before the Supreme Court of the United States and tell that Court with a straight face that *Langenderfer* has abused the judicial process. What mercy are Langenderfer and other competitors to expect from such a party pending the next trial and another round of appeals now that the trial court's injunction has been erased without comment by the Sixth Circuit?

I. BIDDING MARGINALLY OVER TOTAL COSTS (LIMIT PRICING) BY A MONOPOLIST SHOULD NOT BE LEGAL PER SE WHERE THE DELIBERATE INTENT AND EFFECT IS TO EXCLUDE COMPETITION AND MAINTAIN THE MONOPOLY.

We will not repeat here the important and compelling reasons (including the conflicts among the Circuits) for granting Langenderfer's Petition for a writ of certiorari or the legal analysis in support of the foregoing proposition. We incorporate by reference those portions of Langenderfer's Petition (Dkt. 84-508 at pp. 12-28).

We are not confronted here with the situation prevalent in so many other "predatory pricing" cases where plaintiffs attempt to make out a claim of illegal pricing *solely from the pricing practices themselves without direct evidence of predatory intent.* Here we have unrebutted evidence as the Sixth Circuit found that Johnson through its acquisitions created a "monopolistic market structure" and "intended to eliminate competition and dominate the market." Its massive market shares (75% Turnpike and up to 82.5% ODOT) and ability to underbid everybody else's costs by 5% to 10% is unmistakable evidence of monopoly power attained by these ill-gotten acquisitions and other reprehensible practices. No further evidence or a new trial is required to show a violation of Sherman §2.

Again we must take issue with Johnson's Petition (p. 13) where they attempt to "characterize" Langenderfer's charges. Yes, we agree Johnson submitted "unreasonably low" bids to public authorities. But that is not all it did. It almost always bid specific line items which they monopolized below their costs. There were at least two episodes of major bids to ODOT and OTC where Johnson, on its own papers, admittedly bid below its own

total costs. The Sixth Circuit was obviously mistaken and misinformed when it relied on Johnson's appellate representations that it *never* submitted a bid at less than cost (See Langenderfer's Petition, p. 20, n.9.).

Secondly, Johnson's CEO, Kirkby himself, admitted under oath that he bid at his cost or zero profit against Langenderfer and Miller "just to see how tough his competition is." (AII 609-10). He found out—Langenderfer went out of business after eight years of operating losses; Modern Construction quit asphalt paving; three small competitors gave up bidding against Johnson; and five competitors removed their plants and left the area. This sworn statement came from a man who privately admitted "that he did not like Langenderfer or Miller (another competitor) and wanted to run them out of business." 729 F.2d at 1054. He never denied either of these statements in court. "Predatory pricing differs from healthy competitive pricing in its motive: a predator by his pricing practices seeks 'to impose losses on other firms, not garner gains for itself.'" *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 853-54 (5th Cir.), *cert. denied*, 454 U.S. 1125 (1981). Kirkby himself has provided the classic direct evidence by which all predatory pricing intent can be hereafter judged.

Thirdly, for over six years Johnson bid 5% to 10% below all its competitors' costs when it won the bid; when somebody else won the bid the winning bid was 1% to 3.7% below the next closest bidder (AI 466-67, AIII 55, PX 75). What this means is this: Johnson knew from the detailed public bid tabulations that it was beating its competition by 5% to 10% more than was necessary to get the job. Why did Johnson year after year "leave money on the table" when it could have won the jobs anyway by bidding at least 5% higher? Kirkby said he did so to remain dominant and keep competition

out of the area and to make sure Langenderfer and Miller didn't get any jobs (AI 564, AI 617-18). In other words, Kirkby was content to give up profits that were there for the taking in order to rub his competitors' noses in it—to show them they didn't have a chance and might as well give up. They did. That is monopoly power at work; it is also "predatory" bidding or the English language has lost its meaning.

Johnson pretends that "the bids are secret. No one knows who will be low bidder until the bids are publicly opened." (Johnson's Petition, p. 13). No knowledgeable person believes this—least of all Johnson. Johnson knows just as well as its competitors what their bids have to be. Why? First, Johnson sells them the stone or sand they need to bid the job. That is the major cost on a job. Even if Johnson doesn't sell them, France does, and the stone prices are high, fixed and identical to Johnson's list prices (AI 105-109; AII 743-44). Secondly, Johnson's estimator notes on his bid sheets exactly how many miles each competitor's plant is from the job and the cost of hauling and laying asphalt is common knowledge as a result of union scale specified by the State (AII 1056-57). In other words, evidence showed that Johnson knew exactly what its competitors' costs were and knew how much to bid to whip them. After each public bid, a bid tabulation for each job showed what each competitor bid per line item as further verification of their costs.

Finally, Johnson argues that there is something sacred about public bidding—that the object of public bidding is the lowest price. Now if that be so, then bidding *below cost* would be approved since the public benefits short term from the lowest price—no matter what. But below-cost pricing is everywhere condemned as illegal and

monopolistic because it discloses a predatory intent to injure competition. Johnson's motive was no different when it gave up profits it could have had for the asking just to see how tough the competition was.

Johnson's argument is totally devoid of any authorities other than the Sixth Circuit opinion itself to support the decision below. There is no just reason to further delay review of Johnson's monopolistic and predatory conduct.

II. SECTION 7 OF THE CLAYTON ACT WAS VIOLATED BY JOHNSON'S ACQUISITIONS WHICH CAUSED INJURY TO LANGENDERFER.

Johnson's Petition (p. 15) suggests that Langenderfer's business "died by its own hand" because as:

> "The Court of Appeals explained: 'Langenderfer did not diversity [sic] its operations, but remained an asphalt paving specialist.' 729 F.2d at 1053."

It is true that the Sixth Circuit made this statement but it is totally without foundation in the record and Johnson knows it. In the very next line, the Sixth Circuit mentions that Langenderfer and its sister companies, NOAP and MacRitchie Materials, controlled a quarry, had four batch plants and a paving business. 729 F.2d at 1053. Langenderfer was fully-integrated but this did not prevent it from being run out of business by Johnson. Johnson's Petition (pp. 6-7) spends two pages describing its twelve acquisitions in innocent colors. It conspicuously fails to mention that some of the quarries and all of the asphalt pavers (except one) were acquired under anti-competitive circumstances and that Johnson insisted on non-competitive covenants from the sellers (729 F.2d 1053-54; AII 1009-1015). Agreements not to compete may be wholly innocent under some circumstances but, in other circum-

stances, they may also be used (as they were here) to expand a monopoly and restrain competition. *See Schine Chain Theatres v. United States*, 334 U.S. 110, 119 (1948):

> "We reach the same result as respects the agreements not to compete which Schine exacted from competitors whom it bought out. It is not enough that the agreements may be valid under local law. Even an otherwise lawful device may be used as a weapon in restraint of trade or in an effort to monopolize a part of trade or commerce. Agreements not to compete have at times been used for that unlawful purpose. See United States v. American Tobacco Co. 221 US 106, 174, 55 L ed 663, 691, 31 S Ct 632; United States v. Crescent Amusement Co. supra (323 US p 181, 89 L ed 167, 65 S Ct 254). If we had here only agreements not to compete, the inferences drawn by the District Court might not be warranted. But in the setting of this record, and against the background of Schine's other monopolistic practices it seems to us that the District Court might infer that the requisite purpose was present and that these agreements were additional weapons in Schine's arsenal of power through the use of which its monopoly was sought to be extended."

Whether or not Johnson's labored attempt to portray its twelve acquisitions as business-as-usual diversification is not the point. The crux of the matter is that even the Sixth Circuit majority found that, based on the evidence, Johnson had created a monopoly and "intended to eliminate competition and dominate the market."

> "Langenderfer presented expert testimony from several economists to the effect that Johnson's acquisitions significantly reduced competition and increased market concentration, thereby creating a monopolistic market structure. Statistical evidence does

support this testimony. Defendants' average annual share of ODOT and OTC projects from 1966-1971 was 46.9%, but they took well over half of the available work during the 1972-78 period.[6] Johnson Companies did 75.8% of all turnpike paving in northwest Ohio during this period. 729 F.2d at 1054.

6. Defendants' annual shares of the relevant ODOT and OTC projects were as follows: 1972—65.3%; 1973—57.6%; 1974—82.5%; 1975—53.2%; 1976—62.6%; 1977—70.4%; 1978—51.3%."

Johnson spends pages 18 and 19 of its Petition arguing the sufficiency of the evidence (which we thought the jury had resolved against them) and claiming that Langenderfer really went out of business simply because Johnson was inherently more efficient than Langenderfer rather than because Johnson monopolized the market.* The trial court dealt with that in sustaining the jury verdict (Langenderfer's Petition, A29):

"As a second reason in support of its motion, defendants contend that plaintiffs failed to establish that defendant's anticompetitive practices were the proximate cause of Langenderfer's demise as an asphalt paving contractor. Defendants urge that plaintiff's downfall was caused, in part, by a declining market for ODOT and OTC work. At trial, defendants also cited many other factors which could affect the profitability of a company. Defendants suggested to the jury that plaintiff's own inefficiency, rather than the bidding practices of the defendants, caused injury to the plaintiffs.

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*Nobody made money but Johnson. By 1978, 5 competitors had losses, 3 had slight increases. The combined competitors totalled net *losses* of $378,000 in 1975; $706,000 in 1976; and $161,000 in 1978. Johnson made $2.7 million profit in 1978 (AII 645-47, AIII 102-03, PX 115-116).

> The question of causation of plaintiff's injuries is a question of fact for the jury to resolve. *Costner v. Blount Nat'l. Bank of Maryville, Tennessee,* 578 F. 2d 1192, 1195 (6th Cir. 1978). Defendants made many of these same causation arguments to the jury during closing arguments. Upon considering all the evidence, the jury resolved the causation question in favor of the plaintiffs under proper instructions."

It is too late for Johnson to try to persuade the Supreme Court that the jury was wrong on the weight of the evidence. As this Court stated in *United States v. Johnston,* 268 U.S. 220, 227 (1925), "We do not grant a certiorari to review evidence and discuss specific facts." Moreover,

> "On appeal . . . the appellate court must consider the evidence in its strongest light in favor of the party against whom the motion for directed verdict was made, and must give him the advantage of every fair and reasonable intendment that the evidence can justify." *Continental Ore, supra* at 696, n.6.

It is, however, interesting to note that Johnson doesn't deny that its acquisitions were substantive anti-competitive violations of Clayton §7. Instead, it argues that Langenderfer couldn't have been hurt by the Union Quarries' acquisition in 1979 because Langenderfer already went out of business in 1978. It takes colossal gall to argue that Langenderfer has no standing to complain of this acquisition because Johnson had already driven Langenderfer out of business. The logical conclusion of Johnson's thesis is that the sooner all of its competitors are driven out of business, the sooner no one will have any right to complain about these acquisitions. To be sure, when Johnson has 100% of the market there will be no one left to be injured. In any event, the trial court, in granting Langenderfer injunctive relief, rejected Johnson's proposition, finding "that the plaintiffs [Langenderfer] have demonstrated

that the defendants' [Johnson] continued activities threaten injury to the plaintiffs' status as a potential competitor as well as to plaintiffs' residual business in the asphalt paving industry." (Langenderfer's Petition A39-40).

Although by now, the pattern is fairly clear, one final distortion of the record perhaps requires correction. Johnson's Petition (p. 19) claims there was no evidence to support Langenderfer's claim that Johnson's monopolistic stone and sand prices subsidized its low-ball bidding of paving contracts. Then, Johnson has the effrontery to quote the trial court out-of-context to the effect: "There was no hard evidence at trial establishing the defendants engaged in these specific practices." The specific practices the trial court was expressly referring to, as a simple reading of its opinion makes clear (Langenderfer Petition, A44), were price discrimination, refusals to deal and tying, *not* profit squeezing or cross-subsidization as Johnson suggests. In fact, the trial court expressly found that (*Id.*, A41 [Emphasis added]): "Defendants' market shares were also a result of their superior vertical integration, i.e., their ownership of stone and sand pits *which enabled the defendants to bid low on asphalt paving work while charging higher prices to competitors for raw materials.*" Both of Langenderfer's expert economists testified at length that these practices of Johnson were profit squeezing and cross-subsidization, yet another form of predatory conduct (AII 778-781; 673-79). Such practices are obviously illegal. "It is clear that a firm may not employ its market position as a lever to create—or attempt to create—a monopoly in another market . . . the use of monopoly power attained in one market to gain a competitive advantage in another is a violation of §2, even if there has been an attempt to monopolize the second market." *Berkey Photo, Inc. v.*

Eastman Kodak Co., 603 F.2d 263, 275-76 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

When Johnson charged its smaller non-integrated competitors monopolistic prices for the very stone and sand they needed to compete (Langenderfer Petition, p. 7) and then turned around and bid below those competitors' costs by more than 5-10% on the paving jobs, it was no wonder they gave up even bidding against Johnson. It was all summed up by one competitor (Sader) who testified that Johnson "bid cheaper than I can buy the material." (AI 444). Not content with that advantage, Sader was told by Kirkby not to bid Johnson's state work and was warned that Johnson wouldn't even supply him stone if he built his own asphalt plant (AI 435-439).

Finally, Johnson claims (Johnson Petition, p. 18) it was "acquitted" of any Clayton Act violation by the Sixth Circuit on its twelve acquisitions except Union Quarries. It is singularly appropriate, and probably of interest to Freudian scholars, that Johnson chose the word "acquitted," more suitable for criminal conduct than civil. Nevertheless, it was "acquitted" by the Sixth Circuit solely on the ground that the acquired asphalt paving companies engaged in construction and repair and interstate highways were not engaged in interstate commerce within the meaning of Section 7 of the Clayton Act. Thus, it was a jurisdictional technicality not a substantive legal innocence that exonerated Johnson. Langenderfer's Petition, pp. 26-28, challenges the Sixth Circuit ruling on that point.

CONCLUSION

We agree with the conclusion of Johnson's Petition (p. 21): "This Court should not send this case back for another month of trial and no one knows how many [years of] appeals thereafter." The case was well and truly tried; the record is complete; the vacation and remand by the Sixth Circuit without review by this Court threatens irremediable hardship, expense, delay and wasted legal effort. Justice will not be served by postponing answers to the vital and fundamental questions posed herein and putting the parties through additional years of litigation, while Johnson continues to reap the fruits of the monopolistic market it has created.

The Sixth Circuit has created a legal per se rule in favor of a monopolist's limit pricing strategy which was adopted with intent "to eliminate competition and dominate the market." The rule ignores motive or intent and market impact. In the words of the dissenting judge, it "create[s] a 'free zone' in which monopolists can exploit their power without fear of Sherman Act scrutiny or sanctions." This case presents a unique opportunity for the Supreme Court to draw a bright line at one end of the predatory pricing spectrum beyond which courts and monopolists clearly may not go. There will never be a purer record for such a purpose.

Again, we agree with Johnson that the legal issues presented by this case (other than Johnson's complaint about the sufficiency of the evidence) merit and require this Court's attention. However, because Johnson as the prevailing party in the Court of Appeals, lacks standing to raise the issues, we respectfully submit that it would be appropriate for the Court to deny Johnson's Petition

and to grant Langenderfer's Petition for Certiorari (Docket 84-508) as the proper vehicle for resolving these issues and thereupon set this case for full briefing and review.

Respectfully submitted,

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APPENDIX A

EXCERPTS FROM THE TRIAL COURT'S MONOPOLY CHARGE TO THE JURY (AII 1103-1108)

* * * * *

The plaintiffs allege that the defendants have violated the Federal antitrust laws by unreasonably restraining trade, monopolizing, and conspiring, and attempting to monopolize, interstate trade and commerce in the asphalt paving industry.

* * * * *

The term "monopolize", as used in the Federal antitrust laws, means the power either to obtain, or to maintain, the power to remove or exclude competitors from the field of competition in a particular business or industry.

In this case the defendants have monopolized, within the meaning of the antitrust laws, if it appears from a preponderance of the evidence in this case: (1) that they have knowingly combined or conspired either to obtain, or to maintain, the power either to remove, or to exclude or keep out, competitors from the field of **[2462]** competition;

(2) that they posses the necessary power to remove or exclude; and

(3) that they have the intent o exercise their power to remove or exclude.

Of course, if the power to remove or exclude competitors has been exercised, and if as a result of the exercise of such power one or more competitors has been re-

moved or excluded, some actual monopolization has already occurred; but it is not necessary that competitors actually be removed or excluded from the field of competition, before a combination or conspiracy can be found to have monopolized.

Monopolization may be found to exist whenever it appears from a preponderance of the evidence in the case that the three essential facts or conditions just stated have in effect occurred.

The mere possession of monopoly power is not sufficient to support a finding of monopolization, unless it is also determined that the monopoly power was wilfully and intentionally acquired and maintained. A **[2463]** person who acquires monopoly power though normal growth and development, as a consequence of having a superior product, or business acumen, or through historical accident, is not guilty of monopolization as defined in this charge. Even under these circumstances, the defendants still may be found to have violated Section 2 of the Sherman Antitrust Act. If such a monopolist abuses his monopoly power and acts in an unreasonably exclusionary manner toward his competitors or potential competitors, then Section 2 of the Sherman Antitrust Act is violated.

* * * * *

There are four essential elements which the plaintiff must prove in order to establish its claim that the defendant has monopolized within the meaning of the antitrust laws:

First: That a relevant market applicable to this claim is what plaintiff claims it to be as follows: the bidding on and award of asphalt paving work on Ohio Department of Transportation (hereinafter abbrevated ODOT) highways and work on the Ohio Turnpike (hereinafter abbreviated OTC) in the Northwestern corner of the State of

Ohio, composed of the following thirteen counties, to-wit: Williams, Defiance, Paulding, Fulton, Henry, Putnam, **[2466]** Lucas, Wood, Hancock, Ottawa, Sandusky, Seneca and Wyandott.

Second: That if so, the defendants possessed monopoly power in that market;

Third: That if so, the defendants did one or more of the acts claimed by the plaintiffs in their complaint, to-wit:

(1) Acquisition of asphalt mix plants and the businesses of defendants Ohio Engineering and Creager, and the capital stock and/or assets of Price Asphalt Paving Company, Northwest Materials, Inc., and Union Quarries Co., all of which are competing asphalt paving contractors in Northwestern Ohio prior to their acquisition by the Johnson Company;

(2) Acquisition of a large number of sand pits and stone quarries in and near Northwestern Ohio, including sand pits and stone quarries on which plaintiffs and other competing highway paving contractors were dependent as sources of supply, with the result that defendants control the dominant source of highway construction materials in Northwestern Ohio, and in many locations, said acquired sand pits and stone quarries **[2467]** are the only economically located source of such materials for highway construction and repair purposes in northwestern Ohio, all of which results in exclusive dealing and distortion of normal competitive conditions;

(3) Acquisition of defendant Calaway, a major bridge building company in Northwestern Ohio, enabling defendant Johnson Company and its subsidiaries to package bridge construction and asphalt paving work and thereby

underbid plaintiffs and other asphalt paving competitors who had to subcontract bridge work;

(4) Selling stone and sand at monopolistic, predatory and unreasonably high prices to plaintiffs and other paving contractors thereby overcharging said parties for stone and sand used in the construction and repair of interstate highways;

(5) Refusing to sell sand on occasion to plaintiffs and other paving contractors and using same exclusively for defendants' purposes so that plaintiffs and other paving contractors had to haul sand from Michigan **[2468]** at greater expense;

(6) Intimidating or discouraging competitors from building their own asphalt plants or bidding against defendants in certain markets on high tonnage jobs threatening to run them out of business, withhold essential stone or sand, undercut them in their local market areas or otherwise leveraging defendants' power in one market to control or suppress competition in another;

(7) Predatory pricing of bids for highway construction and repair contracts to exclude competition with prior knowledge of plaintiffs' and other competing paving contractors' costs;

(8) Forcing plaintiff Langenderfer and other competing paving contractors either to lose highway contracts to defendants, or to take them at a loss or marginal profits, by causing defendant paving contractors to submit contract bids at unreasonably low figures, relying on the excessive profits made by other defendants from the sale of highway construction materials to defendant paving contractors, plaintiffs, or other paving contractors, to produce an overall profit to **[2469]** defendants from the projects;

(9) Subsidizing the predatory bidding practices and operations of defendant paving contractors by the profits and leverage realized from monopolizing or combining, conspiring or attempting to monopolize the production and sale of stone and sand and the prices realized therefrom;

(10) Aggravating still further the effects of these practices by charging to defendants engaged in selling highway construction materials, costs properly allocable to the defendant paving contractors;

(11) Forcing out of business, preventing, discouraging or buying up new or other sources of stone and sand which would have been competitive with those controlled by defendants; and

(12) Suppressing and restraining actual and potential competition by the sheer size and dominance of the financial and physical resources of the combined and affiliated defendant companies and the economic leverage that their integrated operations afforded; **[2470]** and thereby monopolized that market;

Fourth: That if so, such monopolization directly and proximately caused damage to the business or property of plaintiffs.

The burden is upon the plaintiffs to establish each of these four elements by a preponderance of the evidence in the case, although not necessarily to establish every item one through twelve above.

* * * * *